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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 618

THE UNITED STATES OF AMERICA,
EX RELATIONE ETHEL M. McLENNAN,
Petitioner,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

LEWIS EDWIN HOFFMAN,
CHESTER I. LONG,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

	Page
Summary Statement of the Matters Involved...	1
Reasons Relied on for the Allowance of the Writ of Certiorari	4
Brief in Support of Petition for Certiorari	7
1. The Opinions of the Court Below	7
2. Jurisdiction	7
3. Statement of the Case	7
4. The Questions Presented	7
5. Specifications of Error	8
Argument	9
The Discretion of the Secretary of the Interior	9
Circular No. 672	12
Land Decisions	14
West v. Alling, 30 Fed. (2d) 739	15
When Permissive Words are Mandatory	16
Withdrawals under the Act of June 25, 1910	18
Midwest Case (236 U. S. 459)	28
Conclusion	30

Cases Cited.

Barton v. Wilbur	3
Chase v. U. S., 261 Fed. 833	17
Instructions, 48 Land Decs. 98	14
Mason v. Fearson, 9 How. 248	18
Minor v. Mechanics Bank, 1 Pet. 47	16
Pyron v. Wilbur, No. 77631	2
Supervisors v. U. S., 4 Wallace 435	16
Vedder case	21
West v. Alling, 30 Fed. (2d) 739	15

Statutes Cited.

Oil Leasing Act of February 25, 1920	3
Section 1 of Oil Leasing Act of February 25, 1920	9

Page
Section 13 of Oil Leasing Act of February 25, 1920 7
Section 32 of Oil Leasing Act of February 25, 1920 10
Section 35 of Oil Leasing Act of February 25, 1920 3
Act of June 25, 1910 5
Reports to Congress under Act of June 25, 1910.. 5, 8
Order No. 338 ..... 3, 32

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MAY IT PLEASE THE COURT:

The Petition of the United States of America Ex Relatione Ethel M. McLennan, respectfully shows to this Honorable Court:

Summary Statement of the Matters Involved.

This action was originally brought in the Supreme Court of the District of Columbia to compel the Sec-

retary of the Interior, by writ of mandamus, to issue an oil and gas prospecting permit, under the Act of February 25, 1920, to Ethel M. McLennan, who filed application therefor on October 29, 1928 (R. 2).

The lands covered by her application had previously been included in an oil and gas prospecting permit, which was canceled by the Secretary of the Interior, effective October 29, 1928 (R. 2). At a drawing held on that date, in accordance with instructions from the Secretary of the Interior, Ethel M. McLennan was found to be the successful applicant (R. 3). Said application was duly transmitted to the Commissioner of the General Land Office for consideration and issuance of permit, but by letter of March 26, 1929, addressed to the Register, Sacramento, California, which letter was approved by the respondent, the Commissioner of the General Land Office, rejected said application for permit on the ground that the respondent had ordered that "no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929 (R. 4).

Petitioner brought the action above referred to and the Supreme Court of the District of Columbia, on the 15th day of April, 1930, in an opinion by Mr. Justice F. L. Siddons in the case of W. B. Pyron v. Ray Lyman Wilbur, et al., No. 77631, which case was considered by the Supreme Court in conjunction with the case of Ethel M. McLennan, directed that a writ of mandamus issue against the respondent to compel him to reinstate Ethel M. McLennan's application for permit and proceed therewith according to law (R. 33). Said decision was to the effect that re-

spondent had no power to suspend or dispense with the execution, administration, and enforcement of a constitutionally enacted law of Congress: to-wit, the Leasing Act of February 25, 1920 (41 Stat. 437). From the decision of the Supreme Court of the District of Columbia an appeal was taken to the Court of Appeals (R. 12). Said appeal was considered by the Court of Appeals in conjunction with the case of Ray Lyman Wilbur v. Roy G. Barton, et al., in which case Mr. Justice Jennings Bailey of the Supreme Court of the District of Columbia, in an opinion dated April 8, 1930, directed that a writ of mandamus issue against the respondent to reinstate the applications for permit and proceed therewith according to law. Said opinion held in effect that respondent could not defeat the will of Congress by suspending the operations of the Leasing Act and the action of respondent did not constitute a withdrawal of public lands from the filing of applications for oil and gas prospecting permits under the Act of February 25, 1920 (R. 37).

Under Section 35 of the Leasing Act, the public land states are entitled to receive 37½ per centum of the royalties accruing to the Government from production of oil and gas in those states. Such money is to be used for the construction and maintenance of public roads, the support of public schools or public educational institutions as the various state legislatures may direct. They are also interested in taxes accruing from property used in the states in oil and gas operations and the relief from unemployment as a result of such operations.

The action of the Secretary in promulgating Orders No. 337 (R. 4) and 338 (Exhibit "A"), in re-

fusing to issue further prospecting permits which may ripen into leases, very vitally affects said public lands states by the elimination of royalties, taxes and employment.

On such showing of a great public interest, the Court of Appeals allowed the States of New Mexico, Montana, Wyoming, Utah and Colorado to file briefs as amicus curiae and take part in the oral argument of these cases (R. 15, 16).

All of the appeals above referred to were considered jointly in the Court of Appeals of the District of Columbia and on December 1, 1930, the Court rendered its decision reversing the lower court and remanding the cause for further proceedings (R. 19). Mr. Justice Van Orsdel of said Court filed a dissenting opinion (R. 28).

Reasons Relied on for the Allowance of the Writ of Certiorari.

I.

The importance of the questions involved in this case cannot be overstated. They relate to a suspension of the Act of February 25, 1920, by Orders Nos. 337 and 338, made by the Secretary of the Interior on March 16th and 20th, 1929. By said orders all pending applications for prospecting permits were rejected and all future applications were refused. They involve the authority of the Secretary of the Interior to suspend an Act of Congress. Petitioner contends that he has no such authority either by the act involved or the regulations made under it.

The District Court of Appeals by its decision reversing the lower court held that the Secretary of the

Interior could by promulgating Orders Nos. 337 and 338 suspend the operation of the act of Congress of February 25, 1920, and refuse to receive, file and consider on their merits applications for oil and gas prospecting permits under said act.

II.

Another claim advanced in the argument of the case before the District Court of Appeals was that the Orders of the Secretary were in fact a withdrawal of the public lands involved, under the Act of June 25, 1910. Petitioner contends that it was not the purpose of the Secretary to withdraw said lands under that Act, as the requirements of the Act were not complied with in any particular.

The Court of Appeals, by its decision, held that the Secretary of the Interior did withdraw the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, by virtue of the power vested in the President of the United States to withdraw public lands from "settlement, location, sale or entry", (a) despite the fact that no report of such withdrawal under the Act of June 25, 1910, has been made to Congress under the terms of said act, and (b) that no proclamation, formal or otherwise, was ever issued by the President and no notice of any proclamation was given Congress by the Secretary as required by the Act of June 25, 1910.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the District of Columbia commanding that court to certify and to send to this court for its re-

view and determination on a day certain to be therein named, full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5247, Ray Lyman Wilbur, Secretary of the Interior, Appellant v. United States of America, Ex Relatione Ethel M. McLennan, Appellee, and that said judgment of the Court of Appeals of the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

ETHEL M. MCLENNAN,

By Counsel for Petitioner,

LEWIS EDWIN HOFFMAN.
CHESTER I. LONG.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1. The Opinions of the Court Below.

The opinion in the Court of Appeals of the District of Columbia was rendered December 1, 1930 (R. 19). The opinion of the Supreme Court of the District of Columbia was rendered on April 15, 1930 (R. 33).

2. Jurisdiction.

The date of the judgment to be reviewed is December 1, 1930 (R. 19).

Jurisdiction of this court is invoked under section 240 (a), Judicial Code as amended by the act of February 13, 1925.

3. Statement of the Case.

The statement of the case has been given in the petition and in the interest of brevity will not be repeated here.

4. The Questions Presented.

The question involved in this case is whether the Secretary of the Interior under Section 13 of the Oil Leasing Act can refuse an application for prospecting permit filed under that act, without cause, not because of any disqualification of the applicant; not because the lands are not subject to issuance of prospecting permit; but because of a policy adopted by him and not by Congress; or can the Secretary of the Interior suspend an act of Congress without legislative authority.

Another question has been discussed in the briefs and opinions, to-wit: That the lands were withdrawn under the act of June 25, 1910. The answer to the petition in this case does not set up the question of withdrawals. The answer was based upon the exercise of discretion by the Secretary of the Interior which he claims to possess under Section 13 of the Oil Leasing Act.

5. Specifications of Error.

The Court of Appeals of the District of Columbia erred:

1. In reversing the decision of the Supreme Court of the District of Columbia.

2. In refusing to compel the Secretary of the Interior to reinstate petitioner's application for permit and proceed therewith according to law.

3. In holding that the Secretary of the Interior has authority to suspend or dispense with the execution, administration and enforcement of the act of Congress of February 25, 1920.

4. In holding that the act of the Secretary of the Interior was the act of the President, even though the Secretary acted without the scope of his authority.

5. In holding that the action of the Secretary of the Interior was a withdrawal of public lands under the act of Congress of June 25, 1910, even though the terms of said act were not complied with in that the President issued no formal proclamation and the Secretary of the Interior has not transmitted to Congress a report as to said withdrawals.

ARGUMENT.

THE DISCRETION OF THE SECRETARY OF THE INTERIOR.

Petitioner contends first that the Secretary has no discretion under the Oil Leasing Act to suspend it; second, he possesses no such discretion under Circular 672 which is the regulation under said Act. The title of the Act is "An Act *to promote* the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." From the title of the Act the policy is to promote the mining of minerals, above named, and not to discourage the mining of these minerals by suspending the operation of Section 13 of the Act.

Section 1 of the Act is as follows (R. 1):

> "* * * (Describing the minerals including oil and gas) *shall be subject to disposition in the form and manner* provided by this act * * *." (Italics ours.)

By Section 1, deposits of oil and gas on the public domain, *shall* be subject to disposition in the form and manner provided by this Act to citizens of the United States. The lands *shall* be disposed of, a very mandatory expression, and there is no discretion left as to whether or not the Secretary desires to dispose of these lands, but it imposes on him a positive duty to dispose of them as provided in the Act.

Section 13 of the Act is as follows (R. 2, 10):

> "That the Secretary of the Interior is hereby *authorized,* under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit".

It appears that the interpretation of Section 13, whether it is permissive or mandatory, hinges on the word "authorized". In interpreting Section 13 the entire act must be read in order to ascertain whether Congress intended the word "authorized" to mean merely permissive or mandatory upon the Secretary to issue prospecting permits.

Section 32 of the Act is as follows (R. 6):

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and *to do any and all things necessary to carry out and accomplish the purposes of this Act.*" etc. (Italics ours.)

It will be noted that the same word "authorized" which is used in Section 13 is also used in Section 32. If the word "authorized" is permissive and not mandatory in Section 13, then it is fair to assume that "authorized" in Section 32 is also permissive and not mandatory. Is it reasonable to suppose in construing Section 32, that Congress intended that the Secretary of the Interior may or may not prescribe the necessary rules and regulations, to do any and all things necessary to carry out and accomplish the purposes of this Act? Is it reasonable to assume that if the Secretary did not desire to prescribe any regulations to carry out the Act, he need not prescribe such regulations because the word "authorized" is interpreted by him to mean merely permissive and not mandatory? Is it reasonable to construe the word "authorized" as used in Section 32 as merely permissive and that in the place of the Secretary drawing up regulations in order to accomplish the purposes of the Act he may not do so because the word

"authorized" as used in Section 32 is permissive and not mandatory? This is preposterous on the face of it. Therefore, it is fair to conclude that the word "authorized" as used in Section 32 is mandatory and not permissive. In other words, that the Secretary *must* prescribe the necessary rules and regulations in order to carry out the purposes of the Act, and if the word "authorized" in Section 32 is mandatory, by no stretch of the imagination can we construe the word "authorized" in Section 13 to be permissive.

Considering the title of the Act which says its purpose is to "promote" the mining of oil and gas, Section 1, which states that the lands *shall* be subject to disposition in the form and manner provided by this Act, Section 13 which authorizes the Secretary of the Interior to issue prospecting permits to qualified applicants, and Section 32 which authorizes the Secretary of the Interior to draw up the necessary rules and regulations in order to carry out the purposes of the Act as stated in its title and in its enacting clause, the inevitable conclusion is that the word "authorized" is mandatory and not permissive. When we say the word "authorized" is mandatory and not permissive, we do not mean that the Secretary is bound to issue a permit on every application that may be filed. The Act does give the Secretary discretion in the administration of the public lands. But the discretion given to him is a legal discretion and not an arbitrary one. It is true that the Secretary must ascertain the qualifications of the applicant. These qualifications are set out in the Act. The applicant must be a citizen of the United States or an association of such persons, or a corporation organized under the laws of the United States or of any State

or Territory thereof, or a municipality. What are the further qualifications? The lands must not be in a producing structure of an oil or gas field. In ascertaining these qualifications, both as to persons and to the lands, the Secretary exercises a legal discretion, but when this discretion is exercised and he finds that the lands are not within a producing structure and that the applicant is qualified under the Act to receive a permit, his discretion ceases and a permit must issue on such application to carry out the purposes of the Act and the intent of Congress in passing it. We find, therefore, from a study of all the pertinent clauses and sections of the Oil Leasing Act relating to these cases, that the Secretary of the Interior is compelled by law to issue permits to qualified applicants for lands not within a producing structure, and that the word "authorized" as used in Section 13 of the Act, is for all intents and purposes, mandatory and not permissive.

CIRCULAR NO. 672.

Circular No. 672 is the Secretary of the Interior's regulation under the Oil Leasing Act, and the promulgation of which was authorized by Section 32 of the Act.

This circular contains among other instructions, the following paragraph:

> "It should be understood that under the Act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, *as the facts may be deemed to warrant.*"

For over nine years the Department of the Interior had issued permits on applications without ever interpreting this paragraph as now interpreted. For over nine years it has been understood, and by its own action in refusing certain applications, the Department itself has invoked this paragraph by citing *facts* which prompted such rejection, as failure to show evidence of citizenship or because the lands were in a producing structure, or because the applicant applied for more acreage than he was allowed by law. Not until the present Secretary of the Interior came into office has any other interpretation been given to this paragraph. Assuming, however, that the interpretation of this paragraph in circular No. 672 is a proper one, then Orders Nos. 337 and 338 are null and void because nowhere within the Act itself is the Secretary given the power to reject in whole or in part, an application for prospecting permit as he sees fit, and no regulation can amend or suspend an Act of Congress. His authority to draw up any regulation governing this Act is circumscribed by the language in Section 32, and it is inconceivable that Congress which spent nine years in considering legislation governing mining on the public domain before passing this Act, will permit anyone to destroy that legislation at will, which the Secretary has done by his Orders Nos. 337 and 338.

It is true, that he exercises a legal discretion as this paragraph in Circular No. 672 states, to reject in whole or in part an application for permit in individual cases "as the facts may be deemed to warrant". He is the official in whom authority is vested to determine whether or not an applicant for a permit is qualified under the law, and whether the lands

that such applicant seeks to acquire are available for appropriation under the law.

LAND DECISIONS.

Any number of land decisions maintain the position of petitioner, that the Secretary does not possess the discretion he claims and that these decisions recognize the *right*, not the *privilege* of an applicant who is qualified to a permit for lands which are not in a producing structure.

In 48 Land Decisions, 98, are Instructions by the Secretary of the Interior.

A number of applications for permits were filed on the very first day or shortly after the passage of the Act of February 25, 1920, in the State of Montana under Section 13 of the Oil Leasing Act. Because of the vast number of applications involved, it took considerable time for the Land Office to consider these applications. When they finally were considered by the Land Office, it was found that the lands embraced in those applications were, since the filing of same, classified by the U. S. Geological Survey as being in what is known as the Cat Creek producing structure. Accordingly, these applications were held for rejection because the lands were in a producing structure, and on appeal to the Secretary of the Interior, the rejection of these applications was sustained. On a Motion for Rehearing, however, the Secretary reviewed these decisions and in his instructions to the General Land Office stated as follows:

> • • • "Applying the principle so announced, it is clear that not only equitably but legally, qualified persons who filed proper applications for oil

or gas prospecting permits under the Act of February 25, 1920, *can and should not be deprived of their rights, if*, because of delay in action upon the application so filed, there intervenes a designation by this Department of the lands as being within the geological structure of a producing oil or gas field occasioned by a discovery of oil or gas subsequent to the filing of the application in the local land office."

This is a typical case which brings out four important points: First, that the Secretary of the Interior recognized the right to a permit by a qualified applicant upon the filing of an application; Second, that such right is initiated at the time the application was filed and not at the time the application is considered by the General Land Office; Third, that this right is not affected by changes in the status of lands between the time the application was filed and the time that it may be considered by the General Land Office; Fourth, this decision clearly shows, coming as it does from the Secretary of the Interior, the kind of discretion granted him under Section 13 of the Oil Leasing Act, a discretion which he properly and judiciously used in the above case. We see, therefore, by this decision, that the Department of the Interior has steadfastly recognized the right to a permit by a qualified applicant, and that the discretion given him by the Leasing Act refers only in so far as the qualifications of the applicant are concerned, and the nature of the lands involved.

WEST V. ALLING.

The case of West v. Alling, 30 Fed. (2d) 739, is the leading case on the questions involved. The District Court of Appeals said:

> "It will be observed that the Act in Section 1 expressly provides for the disposition of oil and gas land through prospecting permits and subsequent leasing 'to citizens of the United States'; and the power vested in the Secretary to establish rules and regulations for the carrying out of the Act does not imply the power to establish a rule or regulation that will conflict with an expressed provision of the Act. It follows, we think, that if the applicant sufficiently qualifies as a citizen of the United States, the Secretary is powerless to refuse such applicant a permit or to make any rule or regulation that interferes with the right of such applicant."

It will be noted from the above language of the District Court of Appeals that the Secretary is powerless to establish any regulation which conflicts with the expressed provision of the Act and that he has no discretion to issue or not to issue a permit to a qualified applicant.

WHEN PERMISSIVE WORDS ARE MANDATORY.

It is well settled that even where permissive words are used, such as "may" in statutes conferring power upon public officers, without other language showing that it was intended to vest discretion, such words are to be construed as equivalent to "must" or "shall" where the statute imposes a public duty or makes provisions for the benefit of individuals whose rights can not be effectuated without the exercise of the power. See Minor v. Mechanics Bank, 1 Peters 47; Supervisors v. United States, 4 Wallace 435.

In Supervisors v. United States, *supra*, the language used in the Statute conferring authority to levy a tax to satisfy the indebtedness of the county was

"may if deemed advisable." Notwithstanding the accompanying language, i. e., "if deemed advisable", it was held that the statute gave the bank the right to demand that the supervisors should exercise their powers to make a satisfaction of the indebtedness, the Court saying:

> "The conclusions to be deduced from the authorities is, that where power is given to public officers in the language of the Act before us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form is in fact peremptory. What they are empowered to do for a third person the law requires be done."
> * * *
> "In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion but to impose a positive and absolute duty."

In Chase v. United States, 261 Fed. 833 (8 C. C. A.) affirmed (256 U. S. 1), an Act providing for allotments to the children of Omaha Tribe was in question. The Act stated:

> "That the Secretary of the Interior be and he is hereby *authorized* to cause to be surveyed * * * and after such survey and appraisement to sell and convey * * * all the unallotted Omaha Indian Reservation * * *."

In the language of the court (P. 837), it was held that a statute authorizing a public officer to do a thing imposed upon him a positive duty to do such thing which might be enforced by those for whose benefit it was to be done in the absence of words in the statute

giving him discretion. Reference is there made to the case of Mason v. Fearson, 9 How. 248, 258, 13 L. Ed. 130, and cases there cited.

From an interpretation of the Oil Leasing Act itself; from an interpretation of Circular No. 672 which embodies the regulations of the Interior Department of this Act; from the Land Decisions promulgated in the Interior Department and from Court decisions, the Oil Leasing Act, and particularly Section 13 does not give the Secretary of the Interior the right to reject permit applications without cause or on the strength of a policy adopted by him and contrary to a policy adopted by Congress. See Opinions of Justices Bailey and Siddons on the authority of the Secretary to suspend the Act of February 25, 1920 (R. 34, 37).

WITHDRAWALS UNDER THE ACT OF JUNE 25, 1910.

If the Secretary does not possess the power he claims from the Oil Leasing Act itself, does he derive that power from other sources? As stated in the outset, the question of withdrawal has no place in the consideration of this case; the question of withdrawal was not raised by respondent in his answer to the Petition in this case, but as the decision herein complained of is based on an alleged withdrawal, it is necessary to give it consideration.

In the first place, no proclamation or withdrawal of lands was issued by the President of the United States on March 12, 1929, or at any time since. The President did issue a statement through the press in which he stated, among other things that there will be complete conservation of Government oil in this administration. This may be interpreted in a num-

ber of different ways, but it certainly was not a legal withdrawal of lands for any purpose and it was not a proclamation bearing the signature of the President. If the President had issued a formal proclamation withdrawing *all* public lands from further filing for oil prospecting purposes, such action would not have been valid. The Constitution specifically provides that Congress is vested with the power to make rules respecting the public domain. However, this is irrelevant because no proclamation was ever issued withdrawing such lands. No proclamation having been issued, the Secretary is now relying on an alleged withdrawal under the Act of June 25, 1910, and as evidence of such withdrawals he submits a telegram of March 13, 1929, and Departmental Orders Nos. 337 and 338. This telegram was signed by Spry, then Commissioner of the General Land Office and approved by respondent. It reads as follows:—

> "No oil and gas prospecting permits will be issued on and after March Twelfth nineteen Twenty nine Stop Reject all applications for oil and gas permits now pending in your office and receive no more Stop All orders for drawings hereby revoked
>
> SPRY
> *Commissioner*
>
> Approved:
> RAY LYMAN WILBUR
> *Secretary.*"

It will be noted that this telegram is merely direction to the Register to reject all pending applications and refuse to receive any further applications for permits. It does not *describe* any particular lands and does not

cite any particular withdrawal. This telegram, therefore, in itself, could not be considered a withdrawal of lands. Now, if the telegram referred to is not a withdrawal, let us consider Orders Nos. 337 and 338 (R. 4, 20, Exhibit "A"). It is sufficient to state that they are, in substance directions to the Commissioner of the General Land Office and to the Registers of all local Land Offices to reject all applications then pending for oil and gas permits, and to refuse to receive any further applications. No withdrawal of lands made since the establishment of the Land Department was ever termed in the language of this telegram and these Orders. Surely if a withdrawal of lands was contemplated, there is no valid reason why these Orders should not have stated that the lands were withdrawn. The whole gist of these Orders shows clearly that the Secretary erroneously felt that he had authority to issue directions to his subordinate officers to suspend Section 13 of the Oil Leasing Act. The word "withdrawal" is not used in any of the three papers referred to, and neither are any words used from which we can infer a withdrawal of lands. In other words, these memoranda to the press which were later called Orders Nos. 337 and 338, were not withdrawals of public lands but was a withdrawal by the Secretary from his subordinates of their power to carry into effect a Statute enacted by Congress. Even an intimation of the possession of such authority by an administrative officer of the Government is unthinkable. Had certain described lands been withdrawn and had the lands here involved been included in such a withdrawal, then the effect of such withdrawal on the issuance of permits might form a subject of proper discussion, but a withdrawal which was never

made, certainly can not control a decision in this case.

That the Secretary did not rely on any withdrawal having been made in order to sustain his action, is obvious from the decisions and published statements of the Department itself. In the decision in the Vedder case, dated October 8, 1929, and identified in the Department as A-14137, the Secretary states:—

> "By decision of July 24, 1929, the Commissioner of the General Land Office sustained the action of the register of the district land office at Sacramento, California, in refusing to receive for filing an oil and gas prospecting permit application presented by Richard D. Vedder on the ground that by Departmental Order No. 338 of March 20, 1929, the Secretary of the Interior had instructed registers of local land Offices not to receive such applications after March 12, 1929.
>
> "Vedder has appealed, contending that the action was without authority of law. ..
>
> "The appellant neither shows or alleges any right or equity based on lawful or equitable expenditures made or work performed upon or for the land applied for.
>
> "Under the Leasing Act of February 25, 1920 (41 Stat. 437), and the regulations thereunder approved March 11, 1920, reprinted as amended October 29, 1920, the granting of permits or licenses to prospect for oil and gas upon the public lands is discretionary with the Secretary of the Interior.
>
> "This discretion has been exercised as to the appellant, without discrimination, for the general public interest and benefit."
>
> "The action heretofore taken will not be disturbed."

It will be seen from this decision that the reason he gives for the rejection of the application is not based on any withdrawal, but specifically states that under the Leasing Act and the regulations thereunder, the granting of a prospecting permit is discretionary with the Secretary of the Interior, and that this discretion has been exercised by him.

In another decision which was taken on appeal and identified in the Interior Department as A-14139, the Secretary in upholding the rejection of an application, stated: "The granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior." "This conforms to the language of the Statute, Section 13, which is permissive, not mandatory." Not a word is mentioned about withdrawals. In the same decision the Secretary very clearly states, "the present case involves only the Leasing Act of February 25, 1920."

Now by the established principle of construction that the intention of the parties creating a document such as a withdrawal, will govern the interpretation of the nature of that document, we find that by his own acts after the promulgation of Orders Nos. 337 and 338 which the Court of Appeals now claims are withdrawals, the Secretary thought otherwise of them in his decisions on pending cases in the Department, for he cites the authority for issuing orders Nos. 337 and 338 not a withdrawal of lands but the granting of discretion to him by the Act itself. He has even gone further than his decision in showing his intention not to interpret these orders as withdrawals. In the Land Service Bulletins which are published monthly by the direction of the Secretary of the Interior, we find that among other things published in

these Bulletins which are official, that prospecting permits have actually issued since the issuance of Orders Nos. 337 and 338. Now, if these orders can be interpreted as withdrawals, as now claimed by appellant, how could he issue permits to some, and deny a permit to petitioner? True, he claims these cases to be exceptions inasmuch as the issuance of these permits was based on equities established by the applicants because they had submitted a geological report of the lands embraced in such applications which he claims are of benefit to the Government. But withdrawals do not recognize any exceptions except valid subsisting rights at the time the withdrawal is made, and counsel for respondent claims that the filing of an application is not a valid subsisting right, and therefore, no matter what geological reports have been filed by those who are fortunate enough to be favored by the Secretary with the issuance of permits ever since these alleged withdrawals were made, they have no greater rights than petitioner, and the Secretary was wholly wrong in rejecting the application of petitioner or he was wholly wrong in issuing permits to others. If by these Orders the entire public domain which is believed to possess potential petroleum value, has been withdrawn, as must be the case if *any* of said lands have been so withdrawn, then none of said lands have been open to issuance of oil prospecting permits because withdrawn lands are not subject to acquisition. By the fact that the Department has issued such permits proves conclusively that its action denying a permit to petitioner was not based on a question of withdrawal but on the wrongful exercise of a discretion which the Secretary erroneously thought he possessed under the Oil Leas-

ing Act itself. Therefore, the inevitable conclusion is that no withdrawals exist of public lands as held by the District Court of Appeals and the case must stand or fall on the discretion granted to him under the Act itself.

Assuming that the telegram of March 13, 1929 and Orders Nos. 337 and 338 could possibly be interpreted as withdrawals, then we must consider whether or not they comply with the requirements of the withdrawal act of June 25, 1910.

The first section of this Act is as follows:—

> "That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry, any of the public lands of the United States including the District of Alaska, and reserve the same for water power sites, irrigation, classification of lands, or other public purposes, to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Section 2 is immaterial for these cases, but Section 3 further provides:—

> "That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of withdrawals."

A withdrawal, therefore, under the Act of June 25, 1910, must contain five elements.

1. It must be of a temporary nature.
2. The lands withdrawn must be from settlement, location, sale or entry.

3. The lands withdrawn must be for "water power sites, irrigation, classification of lands, or other public purposes."
4. The purpose for which the lands are withdrawn must be specified in the order of withdrawal.
5. Such withdrawals must be reported to Congress by the Secretary of the Interior, "at the beginning of its next regular session after the date of withdrawal."

Now these orders did not contain any one of these five elements, and therefore, if called withdrawals, they are void as they do not comply with the Act of June 25, 1910. They are not temporary in nature because the language used in Orders Nos. 337 and 338 could not be inferred as being of a temporary nature. The word "temporary" or any other words which we can infer as being of a temporary nature, are not used in the entire Orders Nos. 337 and 338 or in the telegram to the Registers of the local Land Offices. In fact the telegram says that no permits will issue after March 12, 1929. It does not use the words "until further notice." The orders Nos. 337 and 338 use similar language.

Second, these orders do not withdraw lands from settlement, location, sale or entry. When the word "settlement" is used it means a man settling on the lands for the purpose of acquiring a homestead. When the word "location" is used, it means the locating of lands for mineral purposes, for instance, and later acquiring patent under the old mining laws. When the word "sale" is used, it means that the lands are bought from the Government at so much per acre under the Isolated Tract laws, for instance. When the

word "entry" is used, it means a homestead entry under the various homestead laws or a mining entry under the old mining law. The issuance of permits does not contain any of these elements because settlement, location, sale or entry, suggests the parting of title by the Government to the lands settled, located, sold or entered, and in issuing a prospecting permit the Government not only constantly maintains title to the land but during the life of the permit and the life of the lease when issued, if a commercial discovery is made, it exercises a complete control of the operation of these lands and shares in the minerals mined. Fourth, the purpose is not stated in these withdrawals. The Act of June 25, 1910, contemplated a legal purpose and the creation of a policy by the Secretary of the Interior is not a legal purpose because the Constitution vested Congress with the power to create such policies by duly enacted legislation which it did in the passage of the Oil Leasing Act.

It does not comply with the fifth element because these Orders which are now submitted as withdrawals were not reported to Congress by the Secretary of the Interior at its next regular session.

Although the Court of Appeals in its decision holds that the acts of the Secretary of the Interior constituted a withdrawal of the public lands of the United States from the filing of applications for oil and gas permits under the Act of February 25, 1920, the terms of the Act of June 25, 1910, have not been complied with in that no report of such withdrawal has been submitted to Congress.

The land applied for by petitioner is situated in the State of California. The report of the Secretary of the Interior to Congress for the year 1928 shows

that 1,178,392 acres of petroleum public lands were withdrawn under the Act of June 25, 1910, within the State of California. No additional withdrawals were reported in the years 1929 and 1930.

In other words, during 1929 when Orders Nos. 337 and 338 were promulgated which the Court of Appeals construes to be a withdrawal, no additional acres of petroleum public lands were included in the reports to Congress as withdrawn under the Act of June 25, 1910; the figures being the same for all three years. The same is true insofar as the States of Montana, Colorado and Utah are concerned. In Wyoming, the number of acres shown as withdrawn in the report for 1929 is some 4,000 acres less than in the report for 1928. No petroleum public lands were reported to have been withdrawn in New Mexico under the Act of June 25, 1910, according to the Secretary's report to Congress.

The above conclusively shows that the Secretary of the Interior did not construe his acts and Orders Nos. 337 and 338 as withdrawals under the Act of Congress of June 25, 1910.

These reports which do not include reference to the discontinuance of the granting of prospecting permits for oil and gas constitute a construction placed by the Department on the Act of June 25, 1910, which is persuasive upon the courts. These orders do not comply with any of the requirements under the withdrawal Act. See Opinion of Justice Bailey on the question as to whether the Orders Nos. 337 and 338 of the Secretary of the Interior constituted a withdrawal of the public lands from prospecting for oil and gas (R. 37).

MIDWEST CASE (236 U. S. 459).

It is claimed that if the Secretary did not possess the kind of discretion which he has exercised in these cases by virtue of the Oil Leasing Act, that the President's statement to the press, the telegram of March 13, 1929, to the local Land Offices and the Secretary's orders Nos. 337 and 338, are not withdrawals, under the withdrawal Act of June 25, 1910, then he has a right to consider them as withdrawals by virtue of the Midwest case.

Let us briefly consider the Midwest Case. In 1909, President Taft was urged by the then Secretary of the Interior to make withdrawals of two tracts of lands in Wyoming and California in order to prevent the alienation of these lands, which were considered as having potential petroleum value, from being located under the old placer mining laws. President Taft withdrew these lands but he doubted his legal right to do so and in a message to Congress recommended legislation giving the President authority to make such withdrawals and validating these withdrawals of 1909. Congress refused to validate these withdrawals but instead, passed the withdrawal Act of June 25, 1910, actually limiting and circumscribing the authority of the President to make withdrawals. The Midwest Co. entered upon lands embraced in the withdrawal of 1909 after the lands were withdrawn. When the case reached this Court it had the question before it merely as to the 1909 withdrawals made prior to the passage of the withdrawal Act of June 25, 1910. This Court held that these withdrawals were valid in the absence of legislation, that it established a law by acquiescence in the absence of a specific Statute. But since the withdrawals con-

sidered in the Midwest case were made, Congress had spoken by the passage of the Act of June 25, 1910, and limited the power of the President to make such withdrawals, something which Congress had not done in 1909 when the withdrawals referred to in the Midwest case were made; therefore, any withdrawals made after June 25, 1910, must conform to that Act.

In the very lands embraced in the 1909 withdrawals, permits under Section 13 of the Oil Leasing Act have been issued both in Wyoming and California and some of these permits have ripened into leases. When the Oil Leasing Act was passed the question arose as to whether or not the existence of these 1909 withdrawals in the States of Wyoming and California, interfered with the issuance of prospecting permits and if they did, as to whether or not the Secretary of the Interior should not recommend to the President the revocation of these withdrawals in order to give full operation of the Oil Leasing Act. When this question was then considered, it was decided by the Solicitor's office of the Interior Department that the existence of these withdrawals made by President Taft in 1909 and any other withdrawals made subsequent thereto, did not in any way interfere with the issuance of prospecting permits under the Oil Leasing Act because these withdrawals only affected such entries on public lands wherein the Government would part with the title to those lands, and did not affect prospecting permits wherein the Government constantly maintains the complete ownership and control of such lands. Permits have issued and have continued to issue to this very day on lands embraced in valid withdrawals. Therefore, even if these Orders are Oil withdrawals, they would not in-

terfere with the issuance of prospecting permits because withdrawn oil lands do not bar the issuance of prospecting permits and do not interfere with the full operation of the Oil Leasing Act.

Insofar as the question of withdrawals are concerned, first, no legal withdrawals were ever made by proclamation or otherwise; second, that if these so-called orders could possibly be interpreted as withdrawals, they are invalid because they do not comply with the withdrawal Act of June 25, 1910; Third, that the Midwest decision does not apply to these cases because the withdrawals referred to in that decision were made prior to the Act of June 25, 1910; and Fourth, admitting that these Orders are withdrawals under the Midwest decision, and for that matter under the Act of June 25, 1910, they do not affect the issuance of prospecting permits as withdrawals of any kind do not interfere with the full operation of the Oil Leasing Act. Therefore, the inevitable conclusion is that the decision of the trial court in granting a Writ of Mandamus on the Petition filed by petitioner is sound in law and should stand, and that the decision of the District Court of Appeals should be reversed.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that petitioner's application for oil and gas prospecting permit under the Act of February 25, 1920, may be considered on its merits and permit issued thereon according to law, and that to such an end a writ of certiorari

should be granted and this Court should review the decision of the Court of Appeals and finally reverse it.

LEWIS EDWIN HOFFMAN,
CHESTER I. LONG,
Counsel for Petitioner.

EXHIBIT "A."

ORDER No. 338.

UNITED STATES,
DEPARTMENT OF THE INTERIOR,
Washington, March 20, 1929.

The following outlines the general procedure in the Department of the Interior for executing the President's public-land oil-conservation policy:

1. All oil and gas applications and permits pending in the office of the First Assistant Secretary of the Interior, under the general leasing act, will be returned to the General Land Office.

2. All oil and gas cases pending in the office of the Solicitor will be reviewed to determine their present status. Those coming within the new policy should be returned to the General Land Office.

3. The preparation of letters in the General Land Office calling upon delinquent permittees to show cause why their permits should not be canceled will be expedited.

4. Oil and gas permits now in good standing will not be proceeded against so long as the terms of the permits are being timely complied with.

5. Where a permittee is entitled to a lease because of discovery, it is mandatory to lease only one-fourth of the area, under strict interpretation of the President's oil policy, except that when the permit covers 160 acres or less, the permittee would be entitled to lease the full acreage. The remainder will not be leased unless such action is required in the public interest.

6. The departmental committee, consisting of the Solicitor, the Commissioner of the General Land Office, and the Director of the Geological Survey, will consider the extent of operations which have been prosecuted under existing oil and gas permits, to determine whether permittees have acquired equities

which should be recognized and make appropriate recommendations to the Secretary. In reviewing permits, representative cases may be recommended for public hearing before the Secretary of the Interior to determine lines of policy.

7. Registers of local land offices will not receive applications for oil and gas permits after March 12, 1929, and will reject all pending applications for permits. They will forward to the General Land Office all applications for extensions of time, etc., relative to outstanding permits.

8. Applications for extension of permits on hand should be disposed of promptly. Those not involving expenditure of money in development work will be denied by the General Land Office. All other cases will be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record, and of the Geological Survey as to the status of development work.

9. The General Land Office will hold for cancellation, allowing 15 days in which to show cause, all permits on which there is no prima facie evidence that expenditure of money in development work has been made. All other cases should be referred to the special committee by memoranda of the General Land Office showing the facts disclosed by the record and of the Geological Survey as to status of development work.

10. All oil and gas permits in the Geological Survey pending report to the General Land Office will be promptly considered under the new policy. Where these cases involve conflict of agricultural and mineral rights or question of similar character, they should be completed by the Geological Survey. All others should be returned to the General Land Office with appropriate report when such is required under the new policy, otherwise without report.

11. Supervisors of oil and gas operations in the Geological Survey must deny approval to notices of intention to drill on permits that are not shown to be

in good standing by the terms of the permit itself or an approved extension of time.

12. The Geological Survey will report to the Secretary on the likelihood of oil and gas drainage of Government lands in various producing and wildcatting fields were a claim of drainage is made. The special committee will consider the question of drainage only when incidentally involved in individual permits before it for consideration.

13. Permits issued and outstanding in Executive Order Indian Reservations under the act of March 3, 1927, will be considered and disposed of in the same manner as provided in the foregoing paragraphs.

RAY LYMAN WILBUR,
Secretary of the Interior.